(2)

No. 01-1727

JUN 27 2002

In The

Supreme Court of the United States

STATE OF NEW JERSEY, *et al.*,

Petitioners,

v.

A.A., *et al.*, Individually and as Representatives of a class pursuant to Fed. R. Civ. P. 23(a) and 23(b),

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit Before Judgment

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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REASONS FOR DENYING THE WRIT

The State's petition for a writ of certiorari before judgment should be denied because there is no reason to depart from normal appellate practice in this case. Supreme Court Rule 11 provides that certiorari before judgment will only be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Petitioners have not met that high standard.

THERE IS NO REASON FOR THE COURT TO GRANT CERTIORARI BEFORE JUDGMENT IN THIS CASE.

Certiorari before judgment is "an extremely rare occurrence." *Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1304 n.* (1976). Pursuant to Supreme Court Rule 11, certiorari before judgment will only be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." *See Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment because of the "imperative public importance of the issue" and "because of the disarray among the Federal District Courts"); *Moore v. Regan*, 453 U.S. 654, 668 (1981) (granting certiorari before judgment because the issues presented "are of great significance and demand prompt resolution").

Without so much as a mention of Supreme Court Rule 11, the State contends that the extraordinary procedure of a writ of certiorari before judgment is appropriate in this

case because the district court's opinion will impede New Jersey's ability to fully implement its sex offender Internet registry, Pet. at 8, and because the Court has granted certiorari in cases from the Ninth and Second Circuits raising issues that bear a "close relationship" to the issues raised in this case, regarding the constitutionality of states' sex offender registration and notification laws. Pet. at 10. Neither of these rationales comes close to meeting the standard set forth in Rule 11. Accordingly, the petition should be denied and the Third Circuit afforded the opportunity to address and decide the issues presented in the case, pursuant to normal appellate procedure.

The State contends that the Court should grant a writ of certiorari before judgment, first because the district court's order will impede the operation of New Jersey's Internet sex offender registry and thereby undermine public safety. Pet. at 12-14. Notably, however, the State has never sought a stay of the district court's order. This failure casts serious doubt on the State's current assertion that interests of public safety require the urgent attention of this Court. Moreover, the district court's order prevents only one piece of information from being included on the Internet registry: the home address. Pet. App. at 58a. It does not prevent the State from putting all other information about offenders, including their names, photographs, criminal histories, vehicle information, and county of residence, on the Internet site. Pet. App. at 52a, 58a. Nor does it in any way affect the State's ability to continue to provide door-to-door notification, including notification of offenders' home addresses, to those members of the community who are likely to encounter an offender, pursuant to the same system of notification that has been in place for over seven years. Pet. App. at 52a. And, of course, the

district court's order has no effect whatsoever on the ability of other states to implement their Internet-based registries.

Thus, the State's claims of public importance based upon the effect of the district court's order on its ability to implement an Internet registry and on public safety are vastly overstated. The incremental effect that the district court's order will have on the State's ability to implement its Internet registry does not remotely present the kind of issue of public importance previously held to warrant a writ of certiorari before judgment. *See, e.g.*, *Mistretta,* 488 U.S. at 371 (certiorari granted before judgment to determine constitutionality of United States Sentencing Guidelines statutes); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974) (certiorari granted before judgment in light of "public importance of the [presidential confidentiality] issues presented and the need for their prompt resolution"); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947) (certiorari granted before judgment where district court granted preliminary injunction against nationwide coal strike).

Second, the State argues that the Court should grant a writ of certiorari before judgment so that it can consider the issues presented in this matter at the same time that it considers the related issues presented in two other "Megan's Law" cases on the Court's docket for the coming term, *Godfrey v. Doe*, *cert. granted,* 122 U.S. 1062 (2002) (No. 01-729) and *Department of Public Safety v. Doe*, *cert. granted,* 70 U.S.L.W. 3561 (U.S. May 20, 2002) (No. 01-1231). Pet. at 10-12. However, as the State acknowledges, the issues on which it seeks certiorari are different from the issues presented in the other two cases. Pet. at 12 n.3. Thus, as is usually the case, the Court will be in a better

position to review the issues presented in this case after the Third Circuit renders its judgment. These simply are not the types of circumstances in which deviation from normal appellate processes has been deemed necessary to consider related cases. *See, e.g., Brown v. Board of Education*, 344 U.S. 1 (1952) (certiorari granted before judgment to consider simultaneously several cases challenging the constitutionality of racial segregation in education); *New Haven Inclusion Cases*, 399 U.S. 392, 418 (1970) (certiorari granted before judgment to consider simultaneously cases concerning reorganization and merger of New Haven railroad and Penn Central railroad); *United States v. Thomas*, 361 U.S. 950 (1960) (certiorari granted before judgment to consider simultaneously cases alleging race discrimination in voting registration practices).[1]

Moreover, as to one of the issues on which the State seeks certiorari before judgment, *i.e.*, "whether there is a constitutionally cognizable privacy interest in avoiding disclosure of personal information in general," Pet. at 17-20, the State was the prevailing party in the district court and a ruling by the Court in the State's favor on this issue would not afford the State any relief it has not already received. Accordingly, the State may not seek review of

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[1] The early procedural posture of this case further underscores the impropriety of certiorari at this stage. The district court opinion from which the State appeals was rendered following a motion for a preliminary injunction, without the benefit of a full record. The opinions that the Court will review in *Godfrey* and *Department of Public Safety*, by contrast, were rendered following motions for summary judgment, and were reviewed by the Courts of Appeals.

this issue at all, let alone prematurely. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939). For this reason too, certiorari is not appropriate at this time.

In sum, the State has not demonstrated that a writ of certiorari before judgment is warranted. The incremental effect that the district court's order will have on the State's ability to implement an Internet registry does not present the kind of issue of great public importance that has previously been held to warrant deviation from normal appellate procedure. Nor does the presence on the Court's docket of cases raising related issues merit the extremely rare occurrence of a writ of certiorari before judgment. Consistent with normal appellate procedure, this case should be considered by this Court only after the Third Circuit has rendered its judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari before judgment should be denied. There has been no showing of the extraordinary circumstances required by Supreme Court Rule 11 before the Court will deviate from normal appellate procedure. There will be ample opportunity for the State to seek review in this Court of the issues presented in this case, if it chooses to do so, after the Third Circuit renders its decision.

Respectfully submitted,

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